PERMANENT PARTIAL DISABILITY POST *JOHNSON V. US FOODS*

By Sally G. Kelsey and William L. Townsley, III

THE STATUTE:

The focal point of the controversy concerns K.S.A. 44-510e. Specifically at issue is the following:

> "The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the 4th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the 6th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment in contained therein.

K.S.A. 44-510e(a)(2)(B)

THE DECISION

The controversies arising out of interpretation of K.S.A. 44-510e(a)(2)(B) was resolved in *Howard Johnson, III v. U.S. Food Service and American Zurich Insurance Company*, 312 Kan 597478 P.3d 776 (2021). In *Johnson*, the Kansas Supreme Court considered the constitutional challenge to the statute at issue. Utilizing the "rule of constitutional avoidance", the court noted that it was its "duty to construe a statute as constitutionally valid when it is faced with more than one reasonable interpretation". In other words, "if a court generally, reasonably, plausibly or fairly interpreting its true statutory language consistent with legislative intent in a manner that also preserves it from impermissibility encroaching on constitutional limits, the court must do so".

Applying the rule of constitutional avoidance, the court held that "the language added in 2013 does not change the essential legal standard for determining functional impairment. K.S.A. 44-510e(a)(2)(B) still requires that ratings be "established by competent medical evidence." The 2013 amendments merely reflect an update to the most recent set of guidelines: - which serve as starting point for any medical opinion.

The statute has never dictated that the functional impairment is set by Guides. This has not changed. The key fact – percentage of functional impairment – must always be proved by competent medical evidence."

ALLEN W. WEVE V. TYSON PREPARED FOODS, INC.
CS-00-0313-584;AP-00-0452-304
JANUARY 29, 2021

In a work disability-based dispute ruled on shortly after *Johnson*, the Board recognized the Supreme Court's decision but noted that a Motion to Consider was pending. The Board restated its position that it could not address any constitutionality arguments previously raised by claimant; however, in reaching its conclusions, the Board stated:

"**Medical opinions using the AMA Guides, Fourth Edition, will not be considered at this time.**"

ALLEN W. WEVE V TYSON PREPARED FOODS
JANUARY 29, 2021

The dispute concerned claimant's contention that he was entitled to work disability benefits or more. The 4th Edition ratings from the physicians were in excess of 7.5% and supported claimant's contentions. The ratings from the same physicians under the 6th Edition were all under 7.5%.

Relying upon the 6th Edition, the Board held that claimant failed to meet the threshold impairment for his work disability claim.

SIGRID PIMENTA – STONE V. PARKER HANNIFIN CORPORATION
CS-00-0373-186; AP-00-0452-538
MARCH 15, 2021

In an appeal from an Award in which claimant was denied work disability for failing to meet the threshold impairment, the parties agreed to continue oral arguments, which were initially set in December, 2020, until after the *Johnson* case was decided. The parties argued to the Board on February 19, 2021.

Claimant asked the Board to determine if the 6th Edition fairly accounts for impairment and, alternatively, asked for the case to be remanded for additional evidence to be presented consistent with the *Johnson* mandate.

SIGRID PIMENTA – STONE V. PARKER HANNIFIN CORPORATION
MARCH 15, 2021

- The Board stated that it may not address the issues of constitutionality including whether the 6th Edition fairly accounts for a worker's actual impairment and provides an adequate remedy.
- The Board rejected claimant's request for remand so that claimant's expert could explain the impairment rating in a manner consistent with *Johnson*.
- The Board affirmed the Award finding that the evidence showed claimant's functional impairment to be less than the threshold for work disability.

SIGRID PIMENTA – STONE V. PARKER HANNIFIN CORPORATION
MARCH 15, 2021

Citing *Clayton v University of Kansas hospital Authority* 53 Kan. App. 2d 376 (2017), the Board identified a definition for "competent medical evidence" as "an opinion asserted by a health care provider expressed in terms of 'reasonable degree of medical probability' or similar language"

Citing the same case, the Board held in dicta that in the context of future medical considerations, new evidence may be necessary to rebut the statutory presumption against additional treatment. The Board noted "*Clayton* seems to say newer evidence is better than potentially stale evidence in some cases".

MARIA MACIAS DE HERNANDEZ V. TYSON FRESH MEATS, INC.
CS-00-0255-934; AP-00-0454-107
MARCH 29, 2021

This appeal followed an Award in which the ALJ relied solely upon the COIME physician's rating in finding that claimant failed to meet the threshold and denied work disability. It was argued in February after the *Johnson* decision was issued. Again claimant asked the Board to determine whether the 6th Edition fairly accounted for the workers actual impairment and provided an adequate remedy.

MARIA MACIAS DE HERNANDEZ V. TYSON FRESH MEATS, INC.
CS-00-0255-934; AP-00-0454-107
MARCH 29, 2021

Consistent with its prior opinions, the Board held that it was not a court with competent jurisdiction to decide constitutional issues and reiterated that in *Johnson*, "the Kansas Supreme Court held a constitutional challenge against 44-510e(a)(2)(B) [Supp. 2019] failed."

- In reversing the ALJ and awarding work disability benefits to claimant, the Board rejected the COIME physician's opinions and relied upon the parties' experts regarding functional impairment. The Board averaged the expert's ratings which resulted in an impairment greater than 7.5%.

DONALD ADAM V. ASHBY HOUSE LTD AND WESCO INSURANCE COMPANY
CS-00-0443-901; AP-00-0455-555
APRIL 26, 2021

Adam concerns an Award issued with disputed functional impairment ratings. Claimant sought remand of the case to allow for medical evidence to be presented in light of the *Johnson* decision. Contrary to *Pimenta-Stone*, the Board vacated the Award and ordered remand to the ALJ for clarification of the ratings.

DONALD ADAM V. ASHBY HOUSE LTD AND WESCO INSURANCE COMPANY
CS-00-0443-901; AP-00-0455-555
APRIL 26, 2021

The Board found that "the parties were in no position to predict the outcome in *Johnson*. The parties would not be expected to portend use of the *Guides, 6th* was a mere starting point, permitting medical experts to further explain opinions based on competent medical evidence. Before *Johnson*, such evidence was irrelevant."

The Board found that the parties "should be allowed to present additional medical evidence relevant to claimant's impairment . . . especially focused on competent medical evidence as contemplated in *Johnson*."

DONALD ADAM V. ASHBY HOUSE LTD AND WESCO INSURANCE COMPANY
CS-00-0443-901; AP-00-0455-555
APRIL 26, 2021

- Distinguishing *Pimenta-Stone*, the Board noted that claimant had requested the same remand remedy premised on the Board being unwilling to determine impairment based upon the testimony and arguments presented. The Board refused remand because the evidence was sufficient to determine the worker's impairment.
- The Board stated that, unlike *Pimenta-Stone*, the evidence in this case was insufficient to determine the rating. Accordingly, it vacated the Award and ordered Remand for further proceedings consistent with *Johnson*.

LINDA SHEPARD V. WALMART, INC. AND NEW HAMPSHIRE INSURANCE COMPANY
CS-00-0370-193; AP-00-0451-424
MAY 18, 2021

In an appeal from an Award from another functional impairment dispute, claimant contended that the 6th Edition was unconstitutional but sought remand from the Board to allow for additional evidence.

Here, as in Adam, the Board stated "the parties were in no position to predict the outcome in Johnson. . . .. The parties should be allowed to present additional evidence relevant to claimant's impairment . . .. especially focused on competent medical evidence."

The Board vacated the Award and remanded the case to the ALJ to allow the parties to admit additional evidence, if necessary.

DARON BUTLER V. THE GOODYEAR TIRE AND RUBBER COMPANY
CS-00-0285-928; AP-00-0456-096
MAY 27, 2021

Butler is a scheduled injury claim. Claimant appealed from an Award in which the ALJ applied the 6th Edition rating and rejected the 4th Edition ratings. The Board rejected claimant's arguments and held that, for scheduled injuries, the statute requires functional impairment to be based solely upon the 6th Edition.

DARON BUTLER V. THE GOODYEAR TIRE AND RUBBER COMPANY
CS-00-0285-928; AP-00-0456-096
MAY 27, 2021

Applying the fundamental rules of statutory construction, the Board focused on the plain meaning of the KSA 44-510d(b)(23). Here, the Board noted the language distinction between the scheduled injury statute and the general body disability statute in that 44-510d(b)(23) does not contain the phrase "competent medical evidence".

Because the statute provided for no additional evidence or opinions outside of the 6th Edition, the Board concluded that the plain language of 44-510d(b)(23) required functional impairment to be based upon the 6th Edition.

Citing lack of jurisdictional authority, the Board declined to hear claimant's argument that 44-510d was unconstitutional.

EVELYN GUZZO V. HEARTLAND PLANT INNOVATIONS AND EMCASCO INSURANCE COMPANY

UNPUBLISHED COURT OF APPEALS OPINION 490 P.3D 85(TABLE) JULY 16, 2021

Claimant appealed from a Board Order awarding functional impairment based on the 6th Edition. Claimant contended that the 6th Edition was unconstitutional and that the Board erred by not granting her request for a stay pending the release of the Johnson decision. The Court of Appeals panel rejected claimant's appeal and affirmed the Board decision.

EVELYN GUZZO V. HEARTLAND PLANT INNOVATIONS AND EMCASCO INSURANCE COMPANY
UNPUBLISHED COURT OF APPEALS OPINION 490 P.3D 85 (TABLE)
JULY 16, 2021

The Court of Appeals rejected claimant's argument that the Board erred by failing to grant her request for a stay until *Johnson* was decided. The Board majority had rejected claimant's request for stay at oral argument stating that it did not have authority to stay the proceedings. One Board member dissented.

The COA found that, since there was no formal request for a stay, claimant failed to preserve the issue. Citing *Gould v Wright Tree Service*, the COA noted that the Board did have "discretion to grant a stay upon request unless otherwise precluded by law".

Having addressed the stay issue, the COA agreed that the *Johnson* decision mooted claimant's argument that the use of the 6th Edition was unconstitutional.

WILLIAM VANHORN V. BLUE SKY SATELLITE SERVICES AND PREVISOR INSURANCE COMPANY
UNPUBLISHED KANSAS COURT OF APPEALS DECISION 2021 WL3124167
JULY 23, 2021

Claimant appealed from a scheduled knee injury award based upon the 6th Edition functional impairment. In his appeal, claimant challenged the constitutionality of KSA 44-510d(b)(23-24) because it mandated the use of the 6th Edition and deprived claimant of his substitute remedy in workers compensation and resulted in an unconstitutional infringement of his due process rights. The Award was affirmed.

WILLIAM VANHORN V. BLUE SKY SATELLITE SERVICES AND PREVISOR INSURANCE COMPANY
UNPUBLISHED KANSAS COURT OF APPEALS
DECISION 2021 WL3124167
JULY 23, 2021

The underlying Award was addressed by the Board in its order from April, 2020. The appeal to the court of appeals was fully briefed before the Supreme Court released Johnson.

Claimant contended that the statute's mandate to use only the 6th Edition was unconstitutional and requested remand to the ALJ to consider the 4th Edition.

The COA discussed the constitutionality issues and history of the Johnson claim before concluding that – despite that it could see the similarities and differences between the scheduled injury claim and the general body issues decided in Johnson - the issues raised were not well-briefed and thus abandoned by the parties.

The COA affirmed the Board finding substantial and competent evidence supported the order.

GERLINE ZIMERO V. TYSON FRESH MEATS INC.
COURT OF APPEALS 490P.3D. 86 (TABLE)
UNPUBLISHED OPINION
JULY 16, 2021

Claimant appealed the Board's award of 3% BAW impairment based upon the 6th Edition. Relying upon *Johnson*, claimant contended that the Board erred in incorrectly interpreting the statute as *mandating* the use of the 6th Edition instead of using it as a starting point. Claimant sought to have the case reversed and remanded to consider whether the 4th Edition rating constitutes competent medical evidence.

GERLINE ZIMERO V. TYSON FRESH MEATS INC. COURT OF APPEALS 490P.3D. 86 (TABLE) UNPUBLISHED OPINION JULY 16, 2021

The COA noted initially that claimant had not challenged the 6th Edition rating with the Board but rather had challenged the exclusion of a diagnosis rejected by the ALJ; but, because the ALJ and Board had issued the rulings prior to Johnson, the COA considered it a change in the law and considered claimant's appeal.

Stating "***Any reference to the 4th Edition for injuries occurring after January 1, 2015, is irrelevant***", the COA rejected claimant's argument. It held that "*Parties and courts do not choose between using the 4th Edition or the 6th Edition. The 6th Edition is statutorily required*".

The COA found substantial and competent evidence supported the award of benefits and affirmed the Board's ruling.

KEVIN PILE V. TEXTRON AVIATION AND AMERICAN ZURICH INSURANCE
2021 WL 3124157
UNPUBLISHED KANSAS COURT OF APPEALS OPINION
JULY 23, 2021

Respondent appealed the Board's order modifying the ALJ's Award and adding more benefits for claimant. Claimant's cross-appeal challenged the constitutionality of the use of the 6th Edition.

In this case of stipulated compensability, the ALJ awarded claimant benefits for a right upper extremity impairment. Subsequently, the Board modified the Award by including the left upper extremity impairment which increased the value of the Award.

KEVIN PILE V. TEXTRON AVIATION AND AMERICAN ZURICH INSURANCE
2021 WL 3124157
UNPUBLISHED KANSAS COURT OF APPEALS OPINION
JULY 23, 2021

The COA rejected claimant's contention that the 6th Edition was unconstitutional stating that he raised no new issue that was not previously considered in *Johnson* and that stare decisis required the COA to follow *Johnson* particularly since there was no evidence that the Supreme Court would be departing from its decision issued only a few months earlier.

In touching on the issue of competent evidence, the COA noted that the Board had averaged ratings of 0% and 8% to conclude that claimant had a 4% impairment at the left upper extremity. The COA stated: "*We find this approach [averaging ratings] to be reasonable given the significant conflict between the opinions rendered by the medical experts.*"

PRUDENCIO CUEVAS PEREZ V. NATIONAL BEEF PACKING COMPANY AND AMERICAN ZURICH INSURANCE COMPANY
2021 WL 3577940
KANSAS COURT OF APPEALS
AUGUST 13, 2021

Claimant sustained a knee injury at work and sought a total knee replacement. For prevailing factor reasons related to a prior knee surgery 20 years earlier, the ALJ denied claimant's request for a total knee replacement. Claimant appealed to the Board which denied the knee replacement but awarded modified functional impairment.

Claimant filed the petition for review with the COA contending that the prevailing factor issue was wrongly decided and asserting that the prevailing factor statute was unconstitutional. Respondence cross-appealed claiming that the Board adjusted the rating incorrectly because it considered evidence not in the record.

PRUDENCIO CUEVAS PEREZ V. NATIONAL BEEF PACKING COMPANY AND AMERICAN ZURICH INSURANCE COMPANY
2021 WL 3577940
KANSAS COURT OF APPEALS
AUGUST 13, 2021

In affirming the case, the COA addressed claimant's constitutional challenge of KSA 44-508(f)(2) with an analysis similar to Johnson's "rule of constitutional avoidance" approach. The COA found that, since claimant recovered some compensation (but not as much as he wanted), his constitutional argument fails because the constitutionality of a substitute remedy considers the remedy available to claimant. The COA found the prevailing factor statute constitutional.

The COA also analyzed the relationship between the secondary-injury rule and the prevailing factor test holding that these rules work in tandem: "[A] secondary injury must be both the natural and probable consequence of the primary injury and caused primarily by the work accident." Stated differently: "all injuries, including secondary injuries, must be caused primarily by the work accident."

PRUDENCIO CUEVAS PEREZ V. NATIONAL BEEF PACKING COMPANY AND AMERICAN ZURICH INSURANCE COMPANY
2021 WL 3577940
KANSAS COURT OF APPEALS
AUGUST 13, 2021

In regard to the respondent's cross-appeal that the Board erred by reviewing the AMA Guides despite that they were not placed in evidence, the COA held that it could see "***no reason why the Guides may not be judicially noticed as it is a standard reference widely used to assist in the determination of impairment.***"

The COA stated that it was completely unnecessary to require admission of the Guides in every single hearing as there is no disputing their content.

The COA held that the Board did not err in utilizing the Guides to create its impairment rating.

WHAT IS COMPETENT MEDICAL EVIDENCE?

Razo v. Erman Corporation, Inc. 228 Kan 491,496, 618 P.2d 1161 (1980). The issue before the Court concerned whether with regard to considering pre-existing conditions, the award between the employer and the Kansas workers compensation fund was based upon substantial competent medical evidence. The Award was not based upon specific percentages of disability established by medical evidence. The Supreme Court upheld the apportionment Award, stating "While the statute requires the apportionment to be based upon 'medical evidence' it does not preclude consideration of such evidence presented in a general or non-specific manner nor does it preclude other relevant evidence bearing upon the issue."

WHAT IS COMPETENT MEDICAL EVIDENCE?

Kirker v. Bob Bergkamp Const. Co., 286 P.3d 576 (2012).

Here, the Workers Compensation Appeal Board ruled that the respondent was not entitled to a credit for preexisting impairment pursuant to K.S.A. 44-501(c) because it failed to present "competent medical evidence". The Court of Appeals ruled that under K.S.A. 44-501(c), the credit does not need to be shown through competent medical evidence.

WHAT IS COMPETENT MEDICAL EVIDENCE?

Clayton v. University of Kansas Hospital Authority, 53 Kan. App.2d 376, 388 P.2d 187 (2017)

The parties agreed that the term "competent medical evidence" - in the context of workers compensation - would normally mean an opinion asserted by a healthcare provider in terms of "*reasonable degree of medical probability*". This definition was adopted by the Court of Appeals.

WHAT'S NEXT POST *JOHNSON*?